91-836

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In re GRAND JURY PROCEEDINGS:
UNION BANK OF SWITZERLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November 21, 1991

UNDER SEAL

Question Presented

In this case, a U.S. court has ordered that a foreign bank, not subject to the *in personam* jurisdiction of the United States courts, be directed by its parent to commit an act — the disclosure of confidential bank account records — that is a crime in the foreign state where the records are located and in which the subsidiary bank is incorporated and exclusively does business. The parent, a foreign bank that is subject to jurisdiction in the United States, has been held in contempt of court for declining to direct its subsidiary to commit the crime demanded by the Government. The question presented for review, which has sharply divided the Courts of Appeals, is:

> When, if ever, is it proper for a U.S. court to wield its contempt power to compel the disclosure of documents from within the territory of a foreign state when governing foreign law forbids disclosure to any third party?

Rule 29.1 Statement

The subsidiaries and affiliates of petitioner Union Bank of Switzerland, other than wholly-owned subsidiaries, are listed below:

Argor-Heraeus AG, Mendrisio
Banca Internazionale Lombarda, Milan
Bank Cantrade Ltd.
Bank Rohner Ltd.
Banque Fédérale Société de Participation et Financement
Cantrade Participation Ltd.
CS (Cantrade Securities) Investment, London
Financière Fransad, Geneva
HypoSwiss Swiss Mortgage and Commercial Bank
Institut für Automation, Zurich
Intrag Deutschland GmbH, Frankfurt am Main
Intrag International Bond Invest, Luxembourg
Intrag International S.A., Luxembourg
Intrag Ltd., Management of Investment Trusts
Klinik Hirslanden AG, Zurich
Kredit-und Handelsbank Lyss
Motor-Columbus AG, Baden
National Versicherung AG, Basle
PBZ Privatbank Zurich
Perutil, Panama
Saudi-Swiss Bank
Thesaurus Continental Securities Corporation
Zur Schanzenbrücke AG

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In re GRAND JURY PROCEEDINGS:
UNION BANK OF SWITZERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Union Bank of Switzerland ("UBS") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered September 10, 1991.

Opinions Below

The Court of Appeals affirmed the order of the district court without opinion (A1). The district court's oral opinion (A5) and order (A3), dated June 20, 1991, affirmed by the Court of Appeals as having been entered "without error of law," and its order of April 3, 1991 (A8), are unreported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered September 10, 1991. A suggestion of rehearing *en*

banc was denied on November 15, 1991 (A2). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

Rule 17(c) of the Federal Rules of Criminal Procedure provides that subpoenas may be quashed if "oppressive or unreasonable." This case also involves certain statutes and regulations of the Republic of Panama that forbid banks in Panama from disclosing certain bank account records to any third parties, except in accordance with Panamanian law. These statutes and regulations are reproduced in the Appendix at pages A11 through A20.

Statement of the Case

This case presents a fundamental question: when, if ever, may a U.S. court of law compel a foreign bank (or any foreign entity) to produce documents from within a foreign state in violation of the law of that foreign state? This question is of great importance to the banking community, both foreign and domestic, to the business community generally, and to the United States and other nations, particularly in view of the increasing frequency with which U.S. government agencies are seeking to compel the production of documentary and testimonial evidence from abroad.

There is a sharp split in authority among the Courts of Appeals on the question presented. In the Eleventh Circuit, as confirmed in this case, proof that a grand jury subpoena cannot lawfully be complied with is never a basis for quashing the subpoena or excusing compliance therewith. The Eleventh Circuit will not recognize any foreign law that poses an obstacle to compliance with a U.S. grand jury subpoena. The U.S. interest in enforcing the subpoena is deemed paramount *as a matter of law* — without regard to the facts of any particular case, such as the legitimate interests of the

foreign state, the plight of the uninvolved holder of information, the extent to which the grand jury truly *needs* the subpoenaed information, or the availability of alternative, non-confrontational means by which the information might be collected without requiring a violation of foreign law.

The Court of Appeals for the District of Columbia Circuit, however, has reversed a contempt order imposed upon a foreign bank for declining to produce documents in violation of foreign law, and broadly questioned "whether a court *may ever* order action in violation of foreign laws." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987) (emphasis added).[1] The Courts of Appeals for the Fifth, Ninth and Seventh Circuits have also rendered decisions on each side of the question presented.

Given the steady growth in transnational trade and investment, the courts will increasingly be confronted with the question of U.S. power to order the disclosure of privileged information in violation of foreign law (and the concomitant power of foreign states to order U.S. citizens to violate U.S. laws in the United States). The question is starkly and directly presented by this case and is ripe for consideration by the Court. UBS respectfully submits that the Court should take this opportunity to review the question presented and provide guidance to the lower courts to ease what the D.C. Circuit has aptly described as "the difficulties and uncertainties that now pervade this area of the law." *Id.* at 499.

Background

The facts of this case are simple and undisputed.

On February 6, 1991, a subpoena issued by the United States Attorney for the Southern District of Florida was

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[1] The question presented by the instant petition was not raised by the petition filed in *In re Sealed Case*, 825 F.2d 494.

served at the New York branch of UBS, the largest Swiss bank, seeking "[a]ll banking records" relating to certain bank accounts in Switzerland and Panama. This case, however, does not concern records of any bank account with UBS. Rather, insofar as is relevant here, the subpoena demands documents relating to accounts maintained with a different bank, Union Bank of Switzerland (Panama), Inc. ("UBS (Panama)"), a wholly-owned subsidiary of UBS. UBS (Panama) is incorporated under the laws of Panama. *It is undisputed that UBS (Panama) is* not *subject to the* in personam *jurisdiction of the U.S. courts.*

Upon receipt of the subpoena by UBS, counsel for UBS promptly advised the Government that information regarding accounts maintained with the bank in Switzerland or with its subsidiary, UBS (Panama), in Panama could not be disclosed because of bank confidentiality laws in those nations and that persons and institutions who violate those laws are subject to criminal and civil sanctions. At the same time, counsel identified and described specific procedures by which the Government could obtain the information it sought, whether in Switzerland or in Panama, without requiring the commission of a crime.

The Government subsequently withdrew its subpoena to the extent that it sought documents located in Switzerland. As to the Panamanian account records, however, the Government insisted upon UBS's compliance with the subpoena, without regard to the absence of U.S. jurisdiction over UBS (Panama) and without regard to the strictures of Panamanian law.

Neither UBS nor UBS (Panama) is a target or subject of the grand jury investigation. Neither is claimed to be in any way involved in the possible crimes under investigation or in any other wrongdoing. UBS and UBS (Panama) wish to produce the requested account records, and seek only to be

permitted to do so without being compelled to violate the laws of any nation.

The Impossibility of Lawful Compliance with the U.S. Subpoena

It is undisputed that UBS (Panama) cannot lawfully disclose the records sought by the Government. Under Panamanian law it is a *crime* to disclose a bank customer's account records to anyone outside of the bank absent the customer's consent. The crime is punishable by imprisonment for up to two years, fines that could range up to nearly one-quarter of the annual salary of any responsible person, and a ban on employment in the banking profession for up to two years. Unauthorized disclosure also violates civil laws governing banks in Panama. These are not so-called "blocking statutes," directed at perceived overreaching by U.S. courts and government agencies, but laws of general applicability within Panama.[2]

A violation of Panama's bank privacy laws is not excused by the fact that the violation was ordered by a court in a foreign nation. Indeed, Panamanian law specifically provides that it is unlawful to produce documents upon compulsion of foreign authorities. Moreover, it is undisputed that there is no procedure under Panamanian law by which UBS or UBS (Panama) could seek a "waiver" of these prohibitory laws.

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[2] UBS (Panama)'s fear of criminal and civil sanctions in connection with the Government's demand is real and justified. UBS (Panama) and two of its former officers are even now awaiting decision on criminal charges lodged against them for alleged wrongful disclosure of bank accounts records in violation of Panamanian law. The complainants, two former customers of the bank, allege (among other things) that UBS (Panama) sent information regarding their accounts out of the bank to UBS in Switzerland. UBS (Panama) is defending on the ground that the complainants consented to the transmittal of their account information to UBS, which makes the disclosure lawful.

Alternative, Lawful Discovery Procedures

It is undisputed that the Government could obtain the records its seeks, without requiring the commission of any crime, if it would permit UBS (Panama) to seek its customer's consent to disclosure, or if it would seek such consent and, if necessary, *compel* the giving of such consent under the procedure approved in another foreign bank records case, *Doe* v. *United States*, 487 U.S. 201 (1988). Or, the Government could make a request for mutual legal assistance from the Panamanian legal authorities, as UBS proved it did, successfully, in several recent cases, including cases like this one where UBS (Panama) was an uninvolved holder of records.[3]

The lower courts refused to give any consideration to these alternative procedures by which the Government could obtain the information it seeks, quickly and efficiently, without creating a needless conflict between U.S. and foreign law. The availability of such procedures was declared to be irrelevant, as a matter of law (A6).

The Proceedings Below –

The district court summarily denied UBS's motion to quash the grand jury subpoena.[4] The court accepted the Government's argument that under the Eleventh Circuit's

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[3] On April 11, 1991, the United States and Panama formalized the mutual legal assistance procedure that has long been available by executing a Mutual Legal Assistance Treaty. The treaty provides a procedure for the collection of evidence in one of the contracting states (such as bank account records) for use in legal proceedings in the other state, including grand jury proceedings. The treaty has been formally ratified by the Republic of Panama, but the Government has refused to make use of it.

[4] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

Bank of Nova Scotia decisions,[5] proof of prohibitory foreign law can never prevent enforcement of a grand jury subpoena. Thus the district court did not analyze the facts of this case in light of the comity factors set forth in the Restatement (Third) of Foreign Relations Law § 442 (1987), such as the availability of alternative, non-confrontational discovery procedures, or address the several important factual distinctions that UBS identified between this case and the *Bank of Nova Scotia* cases. (*See* page 11, n.8 *infra*.)

UBS promptly advised the Government, with regret, that it remained unable lawfully to produce the documents demanded by the grand jury subpoena.

The court then summarily held UBS in contempt of court and imposed a contempt sanction of $10,000 per day for every day that the bank records of UBS (Panama) are not produced.[6] Judge Nesbitt declared:

> "The *Nova Scotia* case in the Eleventh Circuit teaches the enforcement of grand jury subpoenas and the issuance of contempt are appropriate if the subpoenaed party must violate the bank secrecy laws of another country and that *you simply have to choose between two masters. You have to choose between the United States, to be obedient to our laws or be obedient to Panamanian laws.*

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[5] *United States* v. *Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (*"Bank of Nova Scotia II"*) and *United States* v. *Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (*"Bank of Nova Scotia I"*).

[6] The contempt sanctions were stayed pending appeal. As of the date of this petition, UBS's motion before the Eleventh Circuit for a Fed. R. App. P. 41(b) stay of mandate is pending. If the motion is denied, UBS will immediately make an application to this Court for a stay of mandate pending disposition of this petition.

> It is clearly laid out in *Nova Scotia*. It is clearly the law of the Eleventh Circuit . . . .
>
> The Eleventh Circuit has put all these issues in my opinion to rest. *The government does not have to pursue alternative procedures to obtain these documents*. The fact that you have made every effort is not enough according to case decisions. You must make every reasonable effort. And *every reasonable effort includes having to choose between Panamanian law and United States law.*
>
> . . . .
>
> The law is as straight as an arrow on this subject . . . . [T]he one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under *Nova Scotia* to relieve you from compliance with the court order."

(A6-A7.)

The Eleventh Circuit issued a *per curiam* affirmance, without opinion (Fay and Johnson, Circuit Judges, and Merhige, District Judge, sitting by designation), thus endorsing the position urged by the Government, and adopted by the district courts, that the *Bank of Nova Scotia* decisions establish an absolute rule of law that grand jury subpoenas are always enforceable as against proof that foreign law forbids disclosure.

REASONS FOR GRANTING THE WRIT

I.

This Case Presents a Question Upon Which the Courts of Appeals Are Sharply Divided.

In the past ten years, U.S. courts have increasingly been called upon to adjudicate the difficult issues presented by demands that persons or entities subject to U.S. jurisdiction produce evidence located overseas in violation of foreign law. In the absence of any authoritative guidance from statutory law, federal civil or criminal procedural rules, or this Court, the lower courts have rendered decisions that are hopelessly in conflict with one another. Even if the question is considered only in the relatively narrow context of demands by U.S. investigative agencies for evidence located overseas (as opposed to civil discovery by private plaintiffs), a sharp split in authority now exists between the decisions of the Fifth, Ninth and Eleventh Circuits, on the one hand, and the decisions of the Seventh and District of Columbia Circuits, on the other.

The Eleventh Circuit now applies an absolute rule: proof of prohibitory foreign law is *never* a basis for a court to decline to enforce a grand jury subpoena. In *United States* v. *Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983), the court affirmed an order enforcing a grand jury subpoena that demanded that a Canadian bank produce bank account records located at the bank's branch in the Bahamas. Although Bahamian law prohibited disclosure of the account records, the bank was held in contempt of court for failing to disclose the records. The court recognized that "international friction has been provoked by enforcement of subpoenas such as the one in question," *id.* at 1388, but rejected the bank's argument that considerations of international comity precluded enforcement

of the subpoena. With no more than a bow toward the principles of comity, the court declared, without analysis, that the U.S. interest in enforcement of its tax laws "outweighed" the Bahamian interest in the observance of its banking privacy laws. *Id.* at 1391. The court deemed it "unfortunate" that the bank "suffers from differing legal commands of separate sovereigns," but opined that conflicts between U.S. grand jury procedures and foreign law provide no occasion for the United States to moderate the exercise of its enforcement jurisdiction. *Id.* at 1391.

The Eleventh Circuit reaffirmed its position two years later in *United States* v. *Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), where the bank appealed from a contempt fine of $1,825,000 imposed for its failure to produce documents in violation of foreign law in response to a second subpoena served upon it. The court again rejected the bank's comity and fairness arguments, reasoning that because the bank had "voluntarily elected" to do business in the United States, it must be deemed to have accepted "the incidental risk" that it would be compelled to commit crimes in foreign states at the behest of the United States. *Id.* at 828. If unwilling to accept that risk, the court suggested, banks (and presumably other foreign businesses) simply should not do business in the United States. *Id.*

UBS argued in the courts below that the *Bank of Nova Scotia* cases should be construed as requiring a balancing test, under which conflicts between U.S. grand jury procedures and the substantive law of foreign states would be considered on a case by case basis in light of a variety of factors, such as the scope and effect of the particular foreign law involved, the availability of alternative procedures by which the documents could be produced without violating foreign law, the subpoenaed party's good faith in attempting to effect disclosure, whether it is the target of the investigation, or merely a neutral source of information, the

nationality of the persons or entities who would be required to violate foreign law, and the Government's need for the particular documents sought by the subpoena.[7] On the undisputed facts of this case, these factors point conclusively toward quashing the subpoena served upon UBS, or excusing the bank's inability to comply with it. Nevertheless, the courts below refused to consider the facts or engage in any comity analysis whatsoever. Rather, as the Government urged, the district court declared the *Bank of Nova Scotia* cases to be "dispositive" and Eleventh Circuit law to be "as straight as an arrow on this subject." (A8, A6.)

The Eleventh Circuit's *per curiam* affirmance, without requiring that the district court make any finding of fact on the availability of alternative procedures or any other matter, confirms that the Circuit does not subscribe to any analysis that would require a sensitive balancing of competing national interests.[8]

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[7] In view of comity considerations, § 442 of the Restatement (Third) of Foreign Relations Law (1987) provides that factors such as these should be considered before *any* foreign discovery order is issued, *whether or not* foreign law presents any impediment to compliance. Where, as here, disclosure is prohibited under governing foreign law, § 442(2)(b) flatly provides that courts "should not ordinarily impose sanctions of contempt, dismissal or default." In *Bank of Nova Scotia II*, the Eleventh Circuit rejected § 442 as being advanced only in a tentative draft of the revised Restatement and supposedly not reflecting "the current law of the United States." For the latter proposition, the court cited only its own precedents. Section 442 has now been adopted by the American Law Institute, is supported by many cases, and has been cited with approval by this Court. *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522, 544 n.28 (1987).

[8] The circumstances here present a far more compelling case for an exercise of judicial restraint than did the *Bank of Nova Scotia* cases. In this case, unlike in the *Bank of Nova Scotia* cases, (i) the bank required to produce documents, a subsidiary of UBS, does not do business in the United States and is not subject to the *in*

(continued...)

The U.S. Courts of Appeals for the District of Columbia and the Seventh Circuits have squarely rejected the absolute rule applied by the Eleventh Circuit. In *In re Sealed Case*, 825 F.2d 494, Judges Wald, Bork and Mikva unanimously reversed a contempt order imposed upon a foreign bank for declining to produce documents in violation of foreign law. The facts were the same as in the *Bank of Nova Scotia* cases: a bank with branches in the United States and abroad was subpoenaed by a U.S. grand jury to produce documents located in a foreign country whose laws prohibited disclosure.

The D.C. Circuit began by citing the *Bank of Nova Scotia* cases and cases contrary thereto, and stated that

> "[t]he federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what sanctions the court may levy against a person who refuses to comply with such an order."

Id. at 497 (citations omitted).

The court rejected the proposition that U.S. courts should "simply . . . enter contempt orders in all such cases, no matter how extreme, in utter disregard of comity principles." *Id.* at 499. To the contrary, the court said that

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[8](...continued)

personam jurisdiction of U.S. courts, (ii) production of the documents demanded would require the commission of crimes in the foreign state in which the bank is organized, headquartered and does business exclusively, (iii) simple, quick, inexpensive and lawful alternative means, successfully used by the United States in other cases, including cases involving the UBS subsidiary in Panama, are available by which the information desired could be obtained without creating any confrontation between legal systems, (iv) the relevant Panamanian bank confidentiality laws admit of no exception, other than by order of a Panamanian authority as specified in the Panamanian law, and thus express a strong state interest in prohibiting disclosure, and (v) the good faith of UBS and its Panamanian subsidiary is unquestioned.

"it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *Id.* at 498. In concluding that the contempt order against the bank should be reversed, the court stated:

> "Most important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory. In addition, the bank, against whom the order is directed, is not itself the focus of the criminal investigation in this case but is a third party that has not been accused of any wrongdoing."

Id. These are precisely the facts regarding UBS and UBS (Panama) in this case, upon which the Eleventh Circuit has held UBS in contempt of court.[9] The D.C. Circuit also

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[9] The D.C. Circuit purported to distinguish the Eleventh Circuit cases on the ground that in *Bank of Nova Scotia II* "the contemnor had not acted in good faith, but had undertaken an 'extensive pattern of delay' in the *erroneous* belief that foreign law barred production of the documents in question," *id.* at 498 quoting *Bank of Nova Scotia II*, 740 F.2d at 826 (emphasis in original), and that in *Bank of Nova Scotia I*, "there was considerable room for doubt whether enforcement of the order would require violation of foreign laws on foreign soil." *Id.* at 498. In fact, both *Bank of Nova Scotia* cases concerned *actual* conflicts between U.S. grand jury subpoenas and foreign laws that prohibited disclosure. In *Bank of Nova Scotia II*, the bank's "erroneous" belief related only to Bahamian law; the Eleventh Circuit's discussion of comity principles related to Cayman Islands law, which indeed prohibited disclosure during a period of time when the bank accordingly declined to comply with the subpoena. 740 F.2d at 821, 826. In *Bank of Nova Scotia I*, the court expressly assumed "that the Bank will be subject to criminal sanctions in the Bahamas" if it complied with the subpoena. 691 F.2d at 1386 n.2. In any event, the "distinctions" that the D.C. Circuit posited between the case before it and the *Bank of Nova Scotia* cases are wholly inapplicable in this case in which UBS has been held in contempt: here it is undisputed

(continued...)

found it relevant that "[t]he government may find alternative means to obtain additional information from or through the bank." *Id.* at 499. In this case, as noted, the availability of alternative procedures was dismissed as irrelevant.

In short, the D.C. Circuit acknowledged what should be self-evident on any principled analysis: that in a conflict between sovereigns, the U.S. interest in enforcement of its laws cannot always be paramount. "Though we recognize that the grand jury's investigation may nonetheless be hampered, perhaps significantly, we are unable to uphold the contempt order against the bank." *Id.* at 499. The D.C. Circuit's analysis is squarely rooted in fundamental notions of territoriality and respect for foreign sovereignty, and an understanding of the dilemma faced by disinterested witnesses caught between the irreconcilable commands of different sovereigns.

Along with the D.C. Circuit, the Seventh Circuit has rendered a decision clearly contrary to the Eleventh Circuit's decisions in the *Bank of Nova Scotia* cases and the instant case. In *United States* v. *First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the Seventh Circuit reversed an order granting enforcement of an IRS summons for the production of bank account records in violation of foreign law. The court held that it was "an abuse of discretion to enter an unqualified order compelling production, particularly where there is no indication of the rationale of the decision." *Id.* at 345.

The Seventh Circuit emphasized that it was "aware that the Eleventh Circuit has reached a different result in a case involving a bank which was apparently a neutral source of information, as here." *Id.* at 346-47. The court purported to

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[9](...continued)

that production of the requested account records is prohibited by Panamanian law, and the good faith of UBS is unquestioned.

distinguish *Bank of Nova Scotia I* on the ground that the Eleventh Circuit "had the benefit of findings by the district court, including a finding that the bank had not made a good faith effort to comply with the subpoena." *Id.* at 347. UBS's good faith in this case is undisputed.

Moreover, in conflict with the Eleventh Circuit, the Seventh Circuit thought that the "extent and nature of [the] hardship" imposed on the bank "bears great weight." *Id.* at 345. The court also found it significant that "the critical act of initially conveying the information would take place [in a foreign state]." *Id.* The Eleventh Circuit has specifically rejected placing any emphasis upon "the situs of the evidence." *Bank of Nova Scotia II*, 740 F.2d at 828 and n.17. Finally, the Seventh Circuit found that "[t]hose acting in [the foreign country] would be exposed to criminal liability, not merely a fine, but imprisonment." *Id.* The same would be true in this case if UBS were forced to comply with the subpoena here.

Like the Eleventh Circuit, the Fifth and Ninth Circuits have affirmed orders requiring the production of records in violation of foreign law. In *United States* v. *Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981), the Ninth Circuit affirmed an order imposing sanctions upon a witness for declining to produce business records on the basis of Swiss law. Similarly, in *United States* v. *Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), the Fifth Circuit affirmed a civil contempt order imposed upon a foreign citizen for refusing to divulge to a grand jury information that was protected under foreign law. The Fifth Circuit ruled that the importance of the grand jury's role in "investigating possible criminal violations" in the United States outweighed "the fact that the district court's order will subject [the witness] to criminal prosecution in his country of residence." *Id.* at 407.

II.

The Conflict Between U.S. Discovery Procedures and Foreign Privacy Laws Is a Matter of Great Importance to the Banking Community and the Business Community Generally.

The Eleventh Circuit's rule imposes a heavy burden upon any firm that wishes to do business in the United States and any other country. For a foreign business, the price of admission to the United States is an assumption of the risk that it will be compelled to commit a crime in its home state if called upon to do so by a U.S. prosecutor (or other Government agent) pursuing some investigation in the United States. The Eleventh Circuit's rule can only breed disrespect for the rule of law (and for the U.S. courts) by its insistence that respected, law-abiding international businesses commit criminal acts in foreign states at the behest of the United States. The rule is particularly pernicious because it deprives the subpoenaed party of any opportunity to contest the purported bases of the U.S. court's exercise of extraterritorial jurisdiction to compel an act by a foreign national, in a foreign land, in violation of foreign law. The comity factors set forth in Restatement (Third) § 442 and applied by other courts are dismissed as irrelevant.[10]

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[10] The unfairness to the subpoenaed party is compounded by the fact that it will likely be excluded from the proceedings on its motion to quash by the Government's invocation of grand jury secrecy. In this case, the Government made repeated submissions and applications to the district court *ex parte* and *in camera*, thereby depriving UBS of its right to litigate this case effectively. The district court made no effort to accommodate the competing interests of grand jury secrecy and our adversarial system of justice, as mandated by this Court's recent decision on a motion to quash a grand jury subpoena in *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991). In *R. Enterprises, Inc.*, the Court overruled the Eleventh

(continued...)

We respectfully suggest that the question presented here rivals or exceeds in importance the significant question presented in another foreign discovery case, *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987). In *Aérospatiale*, the Court considered the extent to which U.S. courts must employ the alternative procedures set forth in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, in lieu of the Federal Rules of Civil Procedure, when seeking evidence from a foreign national who is a party to a U.S. lawsuit. *All* of the Justices agreed that respect for the sovereignty of foreign nations, as embodied in the principles of comity, prevents any automatic application of U.S. discovery laws to obtain evidence located outside of the United States — *even from a party to a U.S. lawsuit and even if the documents are not privileged under foreign law.* Rather, the Court held that comity requires a "particularized analysis" in every case "of the particular facts, sovereign interests, and likelihood that resort to [Hague Convention] procedures will prove effective." 482 U.S. at 543-44 (footnote omitted). The Court specifically admonished the lower courts to "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account

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[10](...continued)

Circuit rule applied in the *Bank of Nova Scotia* cases, *see Bank of Nova Scotia I*, 691 F.2d at 1387-88, and held that the relevance of subpoenaed documents must be established if — as here — the Government's need for the documents is challenged. The Court specifically stated that district courts should "craft appropriate procedures" so as to balance the government interest in grand jury secrecy with the challenging party's need "to make the necessary showing . . . . to carry its burden of persuasion" on a motion to quash. *R. Enterprises, Inc.*, 111 S. Ct. at 728. The lower courts refused to require any such procedure be employed here, despite the burden upon UBS and the imposition on international comity entailed by the Government's subpoena.

of its nationality or the location of its operations . . . ." *Id.* at 546.[11] *See also Societe Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 211 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.").

This case presents a far more pointed and difficult question of comity and sovereignty in the context of foreign discovery orders. Here the courts below have ordered documents produced *in direct violation of governing foreign law* and have done so without any consideration of alternative, non-confrontational procedures, without any finding as to the extent of the Government's need for the documents it seeks and without regard to the impossible position in which the order places UBS (Panama), a disinterested third-party witness that is not even subject to the *in personam* jurisdiction of the U.S. courts, much less a party to a U.S. lawsuit. Building upon its comity analysis in *Aérospatiale*, the Court should review the decision of the court below and reject the absolute rule applied by the Eleventh Circuit.

The Eleventh Circuit has abdicated the courts' oversight function as to the grand jury subpoena process. Judicial power may be projected outside the territorial confines of the United States solely at the discretion of the U.S. Attorney's office, pursuing its immediate interest in one investigation or another. And, given the nationwide service of process enjoyed by grand jury subpoenas, this unfettered discretion bestowed upon the U.S. Attorney's office affects multi-

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[11] In a separate opinion by Justice Blackmun, concurring in part and dissenting in part, four Justices decried the "United States courts' preoccupation with their own power to issue discovery orders" and the "parochial views that too often have characterized [foreign discovery] decisions to date." 482 U.S. at 553 n.4, 568 (Blackmun, J.).

national businesses throughout the United States, without regard to conflicting rules in other circuits. From the perspective of multinational enterprises and foreign sovereigns, the Eleventh Circuit rule is, in effect, the law of the United States.

The suggestion by the Eleventh Circuit and other courts that multinational entities must be seen to have accepted the risk of directly conflicting legal obligations is no answer at all. By definition, an entity subjected to two conflicting legal rules cannot comply with both of them. One rule or the other must be violated. A system of law that contemplates that the courts of one sovereign may use their power over nationals of another to override the laws of the other (or of a third sovereign) is contrary to the very notion of the rule of law. The position advanced by these courts is the law of the jungle: the nation that wields the biggest club, be it contempt power or some other coercive authority, will get its way, and at the expense of the innocent private business or individual who, perversely, is directed to commit crimes against one sovereign or be punished by another.

The Eleventh Circuit and other courts have suggested that businesses simply confine their operations to one nation if unwilling to commit crimes in one state at the command of another. (*See* pages 9-10 *supra*.) This is not a real-world solution to the problems posed by the aggressive assertion of U.S. jurisdiction over foreign territory, foreign acts and foreign nationals. Nor is it the province of U.S. courts to regulate, by the imposition of their powerful and harsh contempt powers, whether foreign enterprises may do business in the United States or, for that matter, whether U.S. enterprises may do business abroad.

Courts that have ordered foreign nationals to commit crimes on foreign soil have failed to give heed to the twin guideposts to resolving conflicts of jurisdiction: territoriality and nationality. *See* Restatement (Third) of Foreign Relations

Law §§ 402, 403, 441 (1987). If foreign states were to adopt the views advocated by the Government in this case, U.S. enterprises with overseas operations could be held hostage to demands by foreign states that the enterprises violate U.S. law in the United States. As the D.C. Circuit said in *In re Sealed Case,* 825 F.2d at 498-99:

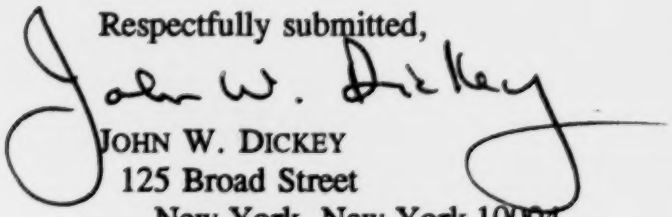
> "We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders. The legal expression of this widespread sentiment is found in basic principles of international comity."

Principles of comity require that the courts of each state make every effort to achieve a reasonable accommodation between conflicting laws. The Eleventh Circuit rule, a stubborn insistence that grand jury subpoenas, once issued, be enforced in every case, without regard to conflicting foreign laws, flouts this fundamental principle of comity between nations and simple good sense.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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Of Counsel

November 21, 1991

Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5522

D. C. Docket No. FGJ 90-2

IN RE: FEDERAL GRAND JURY PROCEEDINGS,
90-2 (MIA), MATTER OF GRAND JURY SUBPOENA
TO UNION BANK OF SWITZERLAND.

UNION BANK OF SWITZERLAND,

Movant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 10, 1991)

Before FAY and JOHNSON, Circuit Judges, and MERHIGE*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Circuit Rule 36-1.
"Costs taxed against movant-appellant."

---

* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by Designation.

Judgment Entered: September 10, 1991
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: September 10, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5522

IN RE: FEDERAL GRAND JURY PROCEEDINGS, 90-2 (MIA)
MATTER OF GRAND JURY SUBPOENA
TO UNION BANK OF SWITZERLAND.

UNION BANK OF SWITZERLAND,

Movant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

Before FAY and JOHNSON, Circuit Judges, and MERHIGE*, Senior District Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. FGJ 90-2(MIA)

IN RE UNITED STATES
GRAND JURY PROCEEDINGS:

GRAND JURY SUBPOENA TO
UNION BANK OF SWITZERLAND
_____/

ORDER

On the Motion of the Government filed in this matter on the 15th day of May, 1991, to compel enforcement of a compulsion order and to Show Cause, and pursuant to the hearing held on June 20, 1991, attended by all parties, it is hereby ORDERED that Union Bank of Switzerland is in contempt of this Court for refusing to comply with the compulsion order of this Court, entered on April 3, 1991, and reinstated on April 16, 1991, requiring the production of certain records pursuant to a Grand Jury subpoena *duces tecum*. Union Bank of Switzerland shall pay sanctions in the amount of Ten Thousand Dollars per day for every day said documents are not produced subsequent to the expiration of any stay.

It is also ORDERED and ADJUDGED that Union Bank of Switzerland's motion for stay of this Contempt Order is hereby DENIED.

It is further ORDERED that this Order is STAYED until 5:00 P.M., June 25, 1991, to permit Union Bank of Switzerland to file a motion for stay with the United States Court of Appeals for the Eleventh Circuit. The record of the above hearing and this Order is hereby Ordered SEALED.

DONE AND ORDERED in chambers at Miami, Florida this 20th day of June, 1991.

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Martin Raskin, Esq.
John Dickey, Esq.
Mark D. Seltzer, AUSA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:	)	
	)	GRAND JURY 90-2 (MIA)
GRAND JURY PROCEEDING BEFORE	)	(NESBITT, D.J.)

Transcript of proceedings before The Honorable LENORE C. NESBITT, United States District Judge, in Miami, Dade County, Florida, on Thursday, June 20, 1991, in the above-styled matter.

Appearances of counsel:

For the Government: Mr. Mark Seltzer
Mr. James Springer

For the Respondent: Mr. Martin R. Raskin
Mr. John W. Dickey
Mr. David A. Heiner, Jr.

Linda E. Fincannon
Official Court Reporter
340 U.S. Courthouse
301 North Miami Avenue
Miami, Florida 33128
305-374-6658

* * * *

THE COURT: The Nova Scotia case in the Eleventh Circuit teaches the enforcement of grand jury subpoenaes and the issuance of contempt are appropriate if the subpoenaed party must violate the bank secrecy laws of another country and that you simply have to choose between two masters. You have to choose between the United States, to be obedient to our laws or be obedient to Panamanian laws.

It is clearly laid out in Nova Scotia. It is clearly the law of the Eleventh Circuit. It is true you are not a target such as in the In Re Sealed case, but you are a bank conducting business here in the United States and you are subject to the laws of the United States.

The Eleventh Circuit has put all these issues in my opinion to rest. The government does not have to pursue alternative procedures to obtain these documents. The fact that you have made every effort is not enough according to case decisions. You must make every reasonable effort. And every reasonable effort includes having to choose between Panamanian law and United States law.

So I don't see any good reason based upon the case law and, quite frankly, having been into this area in the last few days in another proceeding I see no reason why Judge Spellman's order should not be enforced.

The fact that you are not a target is a factor but it is not the only factor the court must consider. So the Eleventh Circuit case decisions I am afraid are not in your favor.

* * * *

THE COURT: The law is as straight as an arrow on this subject which is unless there has been a prima facie showing of contempt, and there has been in this case, been a prior order entered and you haven't complied, you say you are unable to comply because of the violation of foreign

secrecy laws, but the case decisions are legion that the all reasonable effort standard is a very high standard. It doesn't just mean substantial. It doesn't just mean diligent. It doesn't just mean in good faith. It means every single effort that you can make to comply and the one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under Nova Scotia to relieve you from compliance with the court order.

So I am going to ratify and approve Judge Spellman's order of April 3rd and April 16th directing you to comply with the grand jury subpoenaes previously issued in this case and to produce the subject documents.

If you fail to comply, you are to pay a fine in the amount of $10,000 a day for every day the documents are not produced. I am going to enforce that order at this particular time.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. FGJ 90-2

IN RE UNITED STATES
GRAND JURY PROCEEDINGS:

GRAND JURY SUBPOENA TO
UNION BANK OF SWITZERLAND

_____/

ORDER DENYING MOTION TO QUASH
GRAND JURY SUBPOENA

THIS CAUSE comes before the Court upon Union Bank of Switzerland's ("UBS") Motion to Quash a Grand Jury Subpoena.

UBS, a Swiss bank, moves for an Order quashing a subpoena served upon its New York branch. The subpoena requires UBS to obtain and disclose to a Miami federal grand jury records of UBS (Panama), a subsidiary of UBS, incorporated under the laws of the Republic of Panama and located there.

Movant argues that it lacks possession, custody or control of the documents of UBS (Panama). Furthermore, Movant contends that issuance of an order compelling production of bank records of UBS (Panama) would violate International law and Principles of Comity. The Undersigned is not persuaded by Movant's arguments.

Rather, this Court believes that the holding of the United States Court of Appeals for the Eleventh Circuit in *United States v. Bank of Nova Scotia* is dispositive of the present Motion. *United States v. Bank of Nova Scotia*, 691 F.2d 1384

(11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). In *Bank of Nova Scotia*, the Eleventh Circuit stated:

> Absent direction from the Legislative and Executive branches of our federal government we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process. It is unfortunate the Bank of Nova Scotia suffers from differing legal commands of separate sovereigns, but as we stated in *Field*:
>
> > In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.
>
> *In re Grand Jury Proceedings. United States v. Field*, 535 F.2d at 410.

United States v. Bank of Nova Scotia, 691 F.2d 1384, 1391 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). Accordingly, upon careful review of the record, it is hereby

ORDERED AND ADJUDGED that the Motion is **DENIED**. UBS must comply with the Grand Jury Subpoena giving rise to the instant Motion and produce the subject documents within twenty days of the date of this Order. If UBS fails to so comply, the Undersigned will order Movant to pay sanctions in the amount of ten thousand dollars per day for every day said documents are not produced.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of April, 1991.

Eugene P. Spellman
United States District Judge

cc: all counsel of record

LAW NUMBER 18
(of January 28th, 1959)

Whereby regulations are enacted on coded bank accounts.

THE NATIONAL ASSEMBLY OF PANAMA

Decrees:

Article 1) — Banking enterprises and other credit institutions legally established in the territory of the Republic may operate coded current or deposit accounts, which shall be governed by the pertinent provisions of the Code of Commerce, as amended by the within Law.

Article 2) — The coded banking account is a contract whereby a person, whether natural or juridical maintains on deposit with a bank cash, or securities or a credit, and such bank agrees to meet the orders of payment of said depositor up to the amounts of cash delivery of securities that he may have deposited, or the credit granted to him, and to observe strict secrecy as to the existence of the account, its balance and the identity of the depositor.

The interests which under the provisions of a bank account contract may be earned by the depositor are an integral part of the account for all legal purposes.

Article 3) — It is not necessary that the name of the drawer appear on the checks and payment orders drawn against coded current bank accounts or on orders for delivery of securities. The bank shall be required to pay such checks and orders of payment provided that the usual signature previously furnished by the committent and the number assigned to the account appear thereon.

Article 4) — Managers, officers and other employees of banking institutions, whether national or foreign, who reveal or disclose to persons alien to the institutions and to the handling of these accounts any information with reference to the existence, balance or identity of the commitent of a coded bank account shall be punished with imprisonment of from thirty (30) days to six (6) months, fines of from one thousand (B/.1,000.00) to ten thousand balboas (B/.10,000.00), or both.

Article 5) — The information on coded current bank accounts referred to in the preceding article may be revealed by managers and other employees of banking institutions to investigating officers, judges and magistrates who hear criminal proceedings, and who shall hold the information in strict reserve in the event that such information is not conductive to clarifying the punishable facts under investigation.

In the cases in which public functionaries, whether of a judicial or administrative category, other than those mentioned in this article, request from banking institutions any information or the attachment or embargo of coded bank accounts, including probate proceedings, the bank shall not furnish the information, nor withhold the funds or securities deposited in coded accounts, and shall reply to the request stating that it is not possible to furnish any information, even in the cases where there exist the account or the funds or securities covered by the request.

Article 6) — The managers, officers and other functionaries of banking enterprises handling coded current bank accounts shall be subject to the penalties provided for in Article 4 of the within law, even in the cases in which they disclose information on said accounts to officials or employees of the Legislative Organ, the Executive Organ, the Ministry of Finance and Treasury, the Independent Agencies

of the State, the Office of the Comptroller General of the Republic, or the Judicial Organ, other than in the exceptions relative to criminal proceedings stipulated in the preceding article.

Article 7) — The provisions of Article 17 of Law 101 of 1941, as amended by Law 47 of 1954, shall not apply to coded bank accounts.

Article 8) — Banking institutions which by law are required to report to the Department of Internal Revenue of the Ministry of Finance and Treasury on the amounts of interest paid to depositors of coded accounts, shall do so globally, that is, without specifying the amount paid to each depositor.

Article 9) — In the event of the demise of one of the persons authorized to draw against a joint account, the survivors may continue drawing against same.

Paragraph: A joint account is that against which more than one person may draw.

Article 10 — The power to withdraw funds from coded accounts does not cease upon the demise of the grantor of such power.

Article 11 — All provisions contrary to the within Law hereby repealed.

Article 12 — This Law shall become effective upon its publication in the Official Gazette.

Issued in Panama, on the twenty-sixth day of the month of January, one thousand nine hundred and fifty nine.

The President,

(Sgd.) ELIGIO CRESPO V.

The Secretary General

(Sgd.) FRANCISCO BRAVO

REPUBLIC OF PANAMA. NATIONAL EXECUTIVE ORGAN. —

Presidential Palace. Panama, January 28th, 1959. Be it Executed and Published.

(Sgd.) ERNESTO DE LA GUARDIA Jr.

The Minister of Finance and Treasury,

(Sgd.) FERNANDO ELETA A.

Translation

CABINET DECREE NO. 238 (BANKING LAW OF THE REPUBLIC OF PANAMA)

ARTICLE 26: The Commission shall revoke the license of any bank for any of the following reasons:

1) It has ceased to engage in banking business; or

2) It does not begin operations within the six (6) months following the issuance of the license. The Commission may also, by a resolution adopted by a majority vote of five (5) commissioners, revoke said license when a bank does not comply with any of the provisions of this Cabinet Decree. Before revoking the license, the Commission shall serve notice on the Bank advising its intention to revoke, giving it the pertinent reasons to do so, and the Bank shall have a term of twenty-one (21) calendar days, beginning on the day it was served notice, to explain the reasons why it considers that its license should not be revoked, attaching to such explanation the evidence available before the action, which it deems applicable. Once said term expires, the pertinent decision shall be issued by the Commission by means of a resolution.

ARTICLE 65: When requested in writing, every bank shall be obliged to show the inspector, authorized by the Commission for such a purpose, the accounting books, minutes, cash currency securities owned by the bank, documents and vouchers, as well as all the reports and documents relative to its operations.

Nevertheless, in order to protect the interest of the bank's clients and the confidentiality that its operations require, the examination by the Commission's Inspectors may not include any type of deposit accounts, nor the securities in custody, nor the safety deposit boxes, nor the documents

derived from credit transactions, which clients maintain with the bank, unless there is a judicial order issued in accordance with Article 89 of the Code of Commerce.

ARTICLE 74: The Commission is forbidden to conduct or order investigations concerning the private affairs of any bank's clients. The violation of this stipulation shall be sanctioned in accordance with the provisions of Article 101 of this Cabinet Decree.

Paragraph: The Commission may not publish any information acquired pursuant to this Cabinet Decree, unless it has previously obtained the consent in writing of the bank or client concerned.

ARTICLE 83: The Commission, by means of a motivated resolution approved by the vote of five (5) of its members, may intervene a bank, taking possession of its assets and assuming its administration in accordance with the provisions of Article 85, in any of the following cases:

a) If its capital or capital reserve has suffered loss or lacks solidity;

b) If it conducts its operation in an illegal, negligent or fraudulent manner;

c) If it cannot continue its operations soundly;

d) If once requested, it refuses to show the accounting records for operations carried out, or has in some way hindered the inspection of the bank;

e) If the assets of the bank are not sufficient to satisfy the total of its liabilities;

f) If the Commission deems it convenient, because the voluntary liquidation has been unduly delayed.

ARTICLE 101: Any person who furnishes information in violation of this Cabinet Decree, or who violates any of the provisions established in it for which no specific punishment

is provided for shall be subject to a fine from B/.500.00 to B/.1.000.00, imposed by the Commission, without prejudice to the applicable criminal and civil liabilities.

Panama, November 8, 1989

THE ABOVE IS A TRUE TRANSLATION OF ITS ORIGINAL IN THE SPANISH LANGUAGE.

Kora B. de Arias

Translation

CRIMINAL CODE OF THE REPUBLIC OF PANAMA

ARTICLE 170: Anyone who, by virtue of his trade, employment, profession or art, has access to confidential information, the publication of which may be harmful, and who further reveals such information without the consent of the interested party or without such revelation being necessary to safeguard interests of a higher nature, shall be subject to a term of imprisonment ranging from 10 months to 2 years, or a 30 to a 150 day fine, and shall be unable to hold such employment for up to a period of 2 years.

Panama, November 8, 1989

THE ABOVE IS A TRUE TRANSLATION OF ITS ORIGINAL IN THE SPANISH LANGUAGE.

_____

Kora B. de Arias

Translation

CODE OF COMMERCE OF THE REPUBLIC OF PANAMA

ARTICLE 89: *Inviolability of the Confidentiality of Books, Records and Documents (Exceptions)*

No order can be issued to deliver, disclose or inspect the books, letters and other documents or papers of merchants or brokers, except in cases of probate, bankruptcy, or liquidation actions.

Except for these cases, the inspection of ledgers, accounting books and pertinent documents can only be ordered when requested by a party to a lawsuit with a legitimate interest or responsibility in the matter at issue.

The examination will be made at the offices of the merchant or broker, in his presence or in the presence of his attorney-in-fact, and it will be limited to the copy of the entries or papers which have relation with matter at issue.

If the books were located outside the jurisdiction of the Judge who orders the exhibitory action, such action will be executed at the place where these books are, and in no case will the transfer of said books be ordered to the place of the trial.

When a merchant keeps auxiliary ledgers, he can be compelled to exhibit them in the same manner and in the same cases as hereinbefore mentioned.

No authority is empowered to compel a merchant to provide copies or reproductions of his books (or part of them), correspondence or any other documents he may possess. When deemed appropriate to obtain some information in this regard, an exhibitory action will be ordered. Any merchant that furnishes a copy or reproduction of the contents of its books, correspondence or other documents, in

compliance with an order issued by an authority extraneous to that of the Republic of Panama, so that the aforesaid copies, reproductions, correspondence or documents are utilized in litigation overseas, shall be penalized with a fine no greater than One Hundred Balboas (B/.100.00).

Panama, November 8, 1989

THE ABOVE IS A TRUE TRANSLATION OF ITS ORIGINAL IN THE SPANISH LANGUAGE.

Kora B. de Arias

§ 441. *Foreign State Compulsion*

(1) In general, a state may not require a person

(a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or

(b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

(2) In general, a state may require a person of foreign nationality

(a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or

(b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

§ 442. *Requests for Disclosure: Law of the United States*

(1) (a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.

(c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request

would undermine important interests of the state where the information is located.

(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,

(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

(2)

No. 91-836

Supreme Court, U.S.
FILED
JAN 21 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION BANK OF SWITZERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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QUESTION PRESENTED

Whether the district court erred in ordering petitioner to comply with a grand jury subpoena for bank records held by its Panamanian subsidiary, and in holding petitioner in contempt for failing to obey the subpoena.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-836

UNION BANK OF SWITZERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1) is unreported, but the judgment is noted at 946 F.2d 904 (Table). The orders of the district court (Pet. App. A3-A4, A8-A10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. A petition for rehearing was denied on November 15, 1991. Pet. App. A2. The petition for a writ of certiorari was filed on November 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Swiss bank that conducts business in 21 countries through branch or representative offices. UBS Quashal Memo. 4-5. Petitioner has one representative office and four branches in the United States. *Id.* at 5. Petitioner also has subsidiaries in ten countries, including a wholly owned Panamanian subsidiary, Union de Bancos Suizos, Panama, S.A. (UBS (Panama)). *Ibid.* UBS (Panama) ceased operations on December 31, 1990, and is winding up its affairs. Suarez Aff. 4-5.

On February 1, 1991, a federal grand jury in the Southern District of Florida issued a subpoena *duces tecum* to petitioner, ordering it to produce certain records concerning Panamanian bank accounts maintained by UBS (Panama). Gov't Enf. Memo. 1-2. The subpoena was served on petitioner's branch office in New York. *Id.* at 2. The subpoena directed petitioner to produce the records on or before February 20, 1991. *Ibid.* At petitioner's request, the United States Attorney agreed to extend the time to comply with the subpoena until March 6, 1991. *Ibid.* The records sought by the grand jury are relevant to an investigation of possible criminal violations of the federal tax laws. Jackson Aff. 1-2.[1]

On March 5, 1991, petitioner filed a motion to quash the subpoena. Petitioner asserted that, if it complied with the subpoena, UBS (Panama) and its officials would be subject to criminal prosecution un-

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[1] Christine Jackson, an IRS special agent who is assisting the grand jury in its investigation, filed an affidavit under seal setting forth certain details of the grand jury's investigation.

der Panamanian law. UBS Quashal Memo. 4, 10-14. To support this assertion, petitioner filed an affidavit of the secretary of UBS (Panama), Gabriel Suarez. Suarez stated that if petitioner or UBS (Panama) were to comply with the subpoena, the responsible individuals would be subject to imprisonment and fines under Law Number 18 (Pet. App. A11-A13), Cabinet Decree 238 (Pet. App. A15-A17), and Article 170 of the Criminal Code of the Republic of Panama (Pet. App. A18). Suarez Aff. 5-8. Citing Article 89 of the Code of Commerce of the Republic of Panama (Pet. App. A19-A20), Suarez further stated that "Panamanian law *specifically* provides that it is unlawful to produce documents in compliance with an order of a foreign authority." Suarez Aff. 9. Suarez also referred to a case in which UBS bank employees were facing criminal charges for alleged wrongful disclosure of bank records. Suarez Aff. 10-11.

In response, the government filed a memorandum analyzing the facts of this case in light of the balancing analysis set forth in Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987),[2] and Section 40 of the Re-

[2] Section 442(1)(c) of the Restatement (Third) states:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

statement (Second) of Foreign Relations Law of the United States (1965). Gov't Enf. Memo. 7-23.[3]

The government also submitted an affidavit of the Director of the Office of International Affairs (OIA) of the United States Department of Justice. The OIA reviews requests from federal prosecutors to issue subpoenas calling for the production of records located in foreign countries.[4] In reviewing the United States

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[3] Section 40 of the Restatement (Second) states:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[4] The OIA's review is conducted pursuant to guidelines set forth in Section 9-13.525 (formerly Section 9-4.543) of the United States Attorneys' Manual, which require consideration of:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory;
2. The indispensability of the records to the success of the investigation or prosecution; and
3. The need to protect against the destruction of records located abroad and to protect the United States'

Attorney's request in this case, the OIA considered whether alternative methods for obtaining the bank records were available. Arena Aff. 2. The OIA concluded that there are no mutual legal assistance treaties, tax treaties, or other similar agreements currently in force between the United States and Panama.[5] Moreover, Panamanian officials have informed the OIA that Panama does not recognize letters rogatory as an appropriate means for obtaining assistance in criminal matters. *Id.* at 3. And Panamanian officials have stated, both publicly and in private discussions with representatives of the United States, that Panama will not provide legal assistance for use in criminal investigations, proceedings, or prosecutions focusing only on "pure tax" offenses. *Id.* at 3-4. Based on the OIA's recommendation, a Deputy Assistant Attorney General approved issuance of the subpoena. *Id.* at 2.

2. On April 3, 1991, the district court denied petitioner's motion to quash the subpoena. Pet. App. A8-A10. Relying on the Eleventh Circuit's decision in *In re Grand Jury Proceedings*, 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), the court rejected petitioner's contention that issuance of an order compelling compliance with the subpoena would vio-

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ability to prosecute for contempt or obstruction of justice for such destruction.

[5] Although the United States and Panama have signed a mutual legal assistance treaty for use in criminal cases, the United States has not yet ratified the treaty, and there has been no exchange of diplomatic notes putting the treaty into effect. Thus, petitioner's contention (Pet. 6 n.3) that this "treaty has been formally ratified by the Republic of Panama, but the Government has refused to make use of it," is incorrect. In any event, the treaty does not apply to a pure tax investigation such as the present case.

late international law and principles of comity. After "careful review of the record," the court ordered petitioner to produce the subpoenaed documents within 20 days. Pet. App. A9. The court further ordered petitioner to "pay sanctions in the amount of ten thousand dollars per day for every day said documents are not produced," but stayed its order to permit petitioner to file a reply brief. *Ibid.* Petitioner thereafter filed a reply memorandum and several additional motions. On April 16, 1991, the district court denied petitioner's motions and lifted the stay. *Id.* at A3.

When petitioner failed to produce the records called for by the subpoena within the time allowed by the district court, the government filed a motion to show cause why petitioner should not be held in contempt. On June 20, 1991, following a hearing, the district court held petitioner in contempt and imposed sanctions in the amount of $10,000 per day for every day petitioner failed to comply with the court's order. Pet. App. A3-A4.

3. The court of appeals granted petitioner's motion to stay the district court's order pending appeal and ordered that the appeal be expedited. Pet. C.A. Br. 20. In challenging the district court's order before the court of appeals, petitioner contended, *inter alia*, that (1) petitioner did not have custody or control of the records and (2) the district court's orders violated principles of international law and comity. Pet. C.A. Br. 25-52. In the court of appeals, as in the district court, the government's brief discussed the factors quoted above from the Restatement (Second) and the Restatement (Third) of Foreign Relations Law of the United States. Gov't C.A. Br. 25-40.

On September 10, 1991, the court of appeals affirmed the district court's orders without opinion. Pet. App. A1. Petitioner sought a stay in this Court, and the government did not oppose that request. On December 2, 1991, the Court issued an order staying the judgment of the court of appeals pending the disposition of the petition for certiorari.

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the Eleventh Circuit has adopted an "absolute rule" that foreign law is never a basis for quashing a grand jury subpoena, and that this rule conflicts with decisions of other courts of appeals. Contrary to petitioner's contention, the Eleventh Circuit has adopted no such rule, and the conflict posited by petitioner does not exist.

a. In *In re Grand Jury Proceedings*, 691 F.2d 1384, 1388-1389, 1391 (1982), cert. denied, 462 U.S. 1119 (1983) (*Bank of Nova Scotia I*), and *In re Grand Jury Proceedings* (*Bank of Nova Scotia*), 740 F.2d 817, 826-829 (1984), cert. denied, 469 U.S. 1106 (1985) (*Bank of Nova Scotia II*), the Eleventh Circuit rejected the proposition that a grand jury subpoena calling for production of foreign bank records should be quashed merely because compliance with the subpoena might subject the subpoenaed party to criminal sanctions in a foreign country. But the court did not adopt a blanket rule that motions to quash such subpoenas should be denied merely because the subpoenas were issued in the course of a grand jury investigation. Rather, in both cases, the Eleventh Circuit held that it is appropriate to follow the multi-factor balancing test set forth in Section 40 of the Restatement (Second) of Foreign

Relations Law of the United States (1965). Bank *of Nova Scotia I*, 691 F.2d at 1389; *Bank of Nova Scotia II*, 740 F.2d at 826-827. Thus, the relevant Eleventh Circuit precedents reject an "absolute rule" that grand jury subpoenas calling for production of records in a foreign country must be enforced regardless of the restrictions imposed under the laws of that country.

Contrary to petitioner's suggestion (Pet. 11), the court of appeals' summary affirmance in this case does not alter the law of the Eleventh Circuit. Under the rules of that court, disposition of an appeal by judgment order is appropriate only where an opinion would have no precedential value. See 11th Cir. R. 36-1. Absent any indication to the contrary, it must be presumed that the court followed circuit precedent and determined that enforcement of the subpoena at issue is consistent with principles of comity.

b. Petitioner is incorrect in asserting that the decision in this case conflicts with decisions of other courts of appeals. As explained above, there is no reason to believe that the court of appeals departed from the settled principles of law set out in its decisions in the *Bank of Nova Scotia* cases. And those cases are not in conflict with the cases relied on by petitioner.

In *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987), the court of appeals held that the district court should not have entered a civil contempt order against a foreign bank that compelled the bank to act in violation of the laws of another foreign country. Although the panel commented that "it causes us considerable discomfort to think that a court of law should order a violation of

law, particularly on the territory of the sovereign whose law is in question," the court went out of its way to emphasize that it was not barring such orders in all cases. 825 F.2d at 498. The court stated (*ibid.*):

> We do not decide here the general issue of whether a court may ever order action in violation of foreign laws * * *. [H]ere we simply conclude that even if a court has the power to issue such contempt orders under certain circumstances, on the peculiar facts of this case the order should not have issued.

In summarizing its opinion, the court stated (*id.* at 499):

> [W]e emphasize again the limited nature of our holding on this issue. If any of the facts we rest on here were different, our holding could well be different. And though we reverse the district court's order holding the bank in civil contempt on the facts of this case, we of course intend no challenge to the proposition that the vital role of grand jury investigations in our criminal system endows the grand jury with wide discretion in seeking evidence.

One of the facts on which the panel relied was that the bank was "not merely a private foreign entity, but * * * an entity owned by the government of [a third country]." 825 F.2d at 498. That is not the case here and was not the situation in either of the *Bank of Nova Scotia* cases. Another factor on which the *Sealed Case* panel relied was the district court's specific finding "that the bank had acted in good faith throughout these proceedings." *Ibid.* As discussed below, pp. 15-16, *infra*, there is no indication that petitioner has made a good faith effort to comply with the subpoena.

Nor is there any conflict between the decision in this case and the Seventh Circuit's decision in *United States* v. *First National Bank*, 699 F.2d 341 (1983). In *First National Bank*, the district court granted enforcement of an IRS summons to the bank seeking production of certain records in the bank's branch in Athens, Greece. The records were sought in connection with IRS collection efforts. The court of appeals determined that the bank had demonstrated that compliance would subject its employees to substantial criminal penalties under Greek law. The court expressly recognized that a foreign bank secrecy law does not automatically bar a domestic court from compelling production of foreign bank records (699 F.2d at 345), but concluded that a balancing of the factors of Section 40 of the Restatement (Second) weighed against compelling immediate disclosure in that case. *Ibid.* The panel remanded the case to the district court to consider whether the bank should be directed to make a good faith effort to obtain permission to comply with the summons.

The Seventh Circuit expressly distinguished the Eleventh Circuit's decision in *Bank of Nova Scotia I*. In *Bank of Nova Scotia I*, unlike *First National Bank*, the bank had not made a good faith effort to comply with the subpoena. 699 F.2d at 347. In addition, the information in *Bank of Nova Scotia I* was sought by a grand jury conducting a tax and narcotics investigation. In contrast, *First National Bank* involved a civil collection proceeding. *Ibid.* Bahamian law (which was at issue in *Bank of Nova Scotia I*) permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and Bahamian courts, unlike Greek courts, appeared to have significant authority to permit disclosure of

bank records. *Ibid.* (The differences in foreign law were relevant to whether "compliance with the request would undermine important interests of the state where the information is located." Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987)).

The distinctions the Seventh Circuit drew in *First National Bank* plainly apply to this case as well. Petitioner has conceded that Panamanian law permits disclosure of bank records with the customer's consent, and it also permits the disclosure of such records to Panamanian authorities in criminal proceedings. Pet. C.A. Br. 13-14; Pet. App. A12, A18. Thus, Panama has recognized that its interest in preserving the secrecy of bank records is not absolute. In addition, this case involves a grand jury investigation of possible criminal activity, a setting in which the interest in enforcing compliance with a subpoena is at its strongest. See *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 700 (1972). Finally, petitioner has not made a good faith effort to obtain permission from Panamanian authorities to release the bank records. Indeed, there is no evidence that petitioner has done anything in response to the grand jury's subpoena other than to oppose it in the courts of the United States.

More generally, the Eleventh Circuit's approach in cases like this one is consistent with the decisions of other courts of appeals that have employed the fact-intensive balancing analysis set out in the Restatement (Second) and Restatement (Third) of Foreign Relations Law to determine whether a person may be ordered to disclose information in violation of the laws of a foreign country. See *Bank of Nova Scotia II*, 740 F.2d at 826-829 (balancing competing interests); *Bank of Nova Scotia I*, 691 F.2d at 1389

(adopting balancing test); *First National Bank*, 699 F.2d at 345 ("[W]hat is required is a sensitive balancing of the competing interests at stake."); *United States* v. *Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir.) ("Courts must balance competing interests in determining whether foreign illegality ought to preclude enforcement of an IRS summons."), cert. denied, 454 U.S. 1098 (1981); *In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir.) (determination "requires a balancing of * * * several factors"), cert. denied, 429 U.S. 940 (1976). No court of appeals has held that a foreign country's laws create an absolute bar to enforcement of a subpoena calling for documents located in that foreign country. Indeed, such a holding would be contrary to this Court's recognition that foreign confidentiality laws do not automatically deprive an American court of the power to order a party subject to its jurisdiction to produce evidence. *Société Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 205-206 (1958). See also *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522, 544 n.29 (1987).[6]

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[6] Petitioner suggests (Pet. 18) that the court of appeals' decision is in tension with this Court's decision in *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987). But the *Aérospatiale* case concerned discovery under the Federal Rules of Civil Procedure rather than a grand jury subpoena. And the Court approved a balancing analysis similar to the one employed by the Eleventh Circuit in the *Bank of Nova Scotia* cases. See 482 U.S. at 543-546.

Petitioner is also incorrect in asserting (Pet. 16 n.10) that the court of appeals' decision is inconsistent with *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991). In *R. Enterprises*, the Court held that the burden of showing the unreasonableness of a grand jury subpoena is on the re-

2. Although petitioner is dissatisfied with the court of appeals' application of the balancing test in this case, no further review of that fact-bound determination is warranted. In any event, the court of appeals' application of the law to the facts of this case is reasonable and supports enforcement of the subpoena.

a. Petitioner contends (Pet. 12 n.8) that there are "simple, quick, inexpensive and lawful alternative means" by which the government could obtain the subpoenaed information from Panama. This contention ignores the record, which establishes that there is no alternative means of obtaining the subpoenaed documents. Petitioner claims (Pet. 6) that it is "undisputed" that the government could obtain the subpoenaed records by permitting UBS (Panama) to seek its customer's consent to disclosure, or, if necessary, by compelling the customer to consent. But the district court found that "there is reason to believe that notice to the customers of such inquiry would result in the destruction of evidence or seriously jeopardize the grand jury's investigation." Mar. 7, 1991, Order 1; June 12, 1991, Order 1-2. Thus, seeking the customers' consent to disclosure is not a viable alternative.

In addition, the government could not obtain legal assistance from the government of Panama. There

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cipient, and that a motion to quash challenging the subpoena on relevancy grounds "must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." 111 S. Ct. at 728. Here, the district court made findings that "there is reason to believe the records being sought are relevant to a legitimate law enforcement inquiry." Mar. 7, 1991, Order 1; June 12, 1991, Order 1.

are no mutual legal assistance treaties, tax treaties, or similar agreements currently in force between the United States and Panama, and the treaty that has been signed but not ratified does not apply to pure tax matters such as this case. See note 5, *supra*. Moreover, Panama does not recognize letters rogatory as an appropriate means for obtaining assistance in criminal matters, and Panamanian officials have stated that legal assistance will not be provided to the United States for use in criminal investigations focusing only on "pure tax" offenses. Arena Aff. 3.

b. Petitioner also argues (Pet. 12 n.8) that the Panamanian bank confidentiality laws allow only limited exceptions and thus express a strong state interest in prohibiting disclosure. Article 5 of Panamanian Law Number 18 expressly allows bank account information to be revealed to "investigating officers, judges and magistrates who hear criminal proceedings." Pet. App. A12. Thus, the Panamanian national interest in the confidentiality of bank accounts yields to criminal law enforcement. Accordingly, Panama's bank secrecy law is not so absolute that it should be deemed to outweigh the interest of the United States in investigating and prosecuting criminal violations of its tax laws.

Article 89 of the Code of Commerce of the Republic of Panama, on which petitioner relies, provides only for a fine of 100 Balboas (equivalent to $100), and makes no provision for imprisonment. Pet. App. A19-A20. In *Application of Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962), the bank's expert witness on Panamanian law stated that Article 89 "is the only Panamanian law containing any sanctions with respect to production of records in response to foreign process, and that a violation of the Panamanian law

would be equivalent to a misdemeanor under our criminal law." That opinion was rendered despite the existence of Panamanian Law Number 18 (Pet. App. A11-A13), which petitioner claims is the leading bank secrecy statute for Panamanian numbered accounts. Suarez Aff. 6.

c. Petitioner also asserts (Pet. 12 n.8) that production of the documents called for by the subpoena would require petitioner or its representatives to commit crimes within the territorial confines of the Republic of Panama. But any violation of Panamanian law would be completed in the United States, not in Panama. Article 4 of Panamanian Law Number 18, which pertains to bank accounts, punishes bank personnel "who *reveal* or *disclose* to persons alien to the institutions and to the handling of these accounts any information with reference to the existence, balance or identity of the commitent of a coded bank account." Pet. App. A12 (emphasis added). Disclosure to the grand jury would occur in the United States.

Petitioner's reliance (Suarez Aff. 10-11) on a case in which bank employees are facing criminal charges in Panama for alleged wrongful disclosure of bank records is unpersuasive. In that case, the employees were accused (as a result of a private complaint) with misappropriation of funds, withdrawal of moneys owned by the complainants, and conspiracy. Suarez Aff., Exh. F. No such violations are at issue here.

d. Finally, a person ordered to obey a subpoena is "under a duty to make in good faith all reasonable efforts to comply with it." *United States* v. *Ryan*, 402 U.S. 530, 534 (1971). See also *United States* v. *Hayes*, 722 F.2d 723, 725-726 (11th Cir. 1984). One who claims that foreign law would punish his produc-

tion of foreign records must, at the very least, seek permission from the foreign authorities to produce the documents. *Ryan*, 402 U.S. at 534; Restatement (Third), § 442(2).[7]

Although petitioner asserts (Pet. 12 n.8, 14 n.9, 15) that it has made a good faith effort to comply with the subpoena, the record does not support that assertion. Petitioner has failed to ask Panamanian officials to allow disclosure and has failed to make any attempt to bring any form of legal action in Panama. Thus, petitioner has not demonstrated that the enforcement of the subpoena at issue and the sanctions imposed by the district court are inappropriate under principles of comity.[8]

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[7] Section 442(2) provides, in part:

> If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,
>
> (a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;
>
> (b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or failure to make a good faith effort in accordance with paragraph (a).

[8] In his affidavit, the secretary of UBS (Panama) states (Suarez Aff. 4-5) that there is no procedure under Panamanian law by which UBS (Panama) could seek an order permitting disclosure. Petitioner, however, has failed to corroborate this claim with a statement by a disinterested

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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witness or current Panamanian official. Moreover, Suarez does not say that prosecutorial officials lack discretion to decline prosecutions under the confidentiality laws. Thus, it would appear that petitioner could seek an assurance from such officials that a prosecution would not be undertaken in light of the circumstances of this case. Petitioner has not shown that it has taken such action.

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IN THE

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UNION BANK OF SWITZERLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNION BANK OF SWITZERLAND'S REPLY TO BRIEF IN OPPOSITION

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February 10, 1992

Rule 29.1 Statement

The subsidiaries and affiliates of petitioner Union Bank of Switzerland, other than wholly-owned subsidiaries, are listed below:

Argor-Heraeus AG, Mendrisio
Banca Internazionale Lombarda, Milan
Bank Cantrade Ltd.
Bank Rohner Ltd.
Banque Fédérale Société de Participation et Financement
Cantrade Participation Ltd.
CS (Cantrade Securities) Investment, London
Financière Fransad, Geneva
HypoSwiss Swiss Mortgage and Commercial Bank
Institut für Automation, Zurich
Intrag Deutschland GmbH, Frankfurt am Main
Intrag International Bond Invest, Luxembourg
Intrag International S.A., Luxembourg
Intrag Ltd., Management of Investment Trusts
Klinik Hirslanden AG, Zurich
Kredit-und Handelsbank Lyss
Motor-Columbus AG, Baden
National Versicherung AG, Basle
PBZ Privatbank Zurich
Perutil, Panama
Saudi-Swiss Bank
Thesaurus Continental Securities Corporation
Zur Schanzenbrücke AG

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v.

UNITED STATES OF AMERICA,

Respondent.

UNION BANK OF SWITZERLAND'S REPLY TO BRIEF IN OPPOSITION

This petition presents for review issues of undeniable importance to courts, prosecutors, foreign states and the international banking community. The Government resists *certiorari*, nevertheless, on the ground that the circuits are not divided on the central question: whether or in what circumstances, if any, a U.S. court may compel a neutral custodian of documents to disclose them to a U.S. grand jury in violation of the laws of the foreign state in which the documents are located. With respect, the Government's position is simply wrong, as we show herein.

1. Decisions of the circuit courts, and the Government itself in this very proceeding, flatly contradict the claim that the circuits are not divided on the question presented for the Court's

review. As well stated by the D.C. Circuit in a *per curiam* opinion of Judges Wald, Mikva and Bork:

> "[t]he federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what sanctions the court may levy against a person who refuses to comply with such an order."

In re Sealed Case, 825 F.2d 494, 497 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987).[1]

The D.C. Circuit went on to describe cases from the Second, Ninth, Tenth and Eleventh Circuits, showing the contrary approaches to the issue taken by those courts:

> "A line of older Second Circuit cases takes the position that a court should not order violations of foreign law on foreign territory. *See United States* v. *First Nat'l City Bank*, 396 F.2d 897, 901-02 (2d Cir. 1968); *Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960); *First Nat'l City Bank of N.Y.* v. *IRS*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 . . . (1960). Other cases distinguish between a court's ability to order a person to produce documents in contravention of foreign law, which is thought to be acceptable, and its ability to impose sanctions for disobedience to that order, which is thought to be much more problematic. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts*, 563 F.2d 992, 996-99 (10th Cir. 1977); *Compagnie Française d'Assurance Pour le Commerce Exterieur* v. *Phillips Petroleum Co.*,

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[1] The question presented here was not raised by the petition filed in *In re Sealed Case*.

> 105 F.R.D. 16, 26-36 (S.D.N.Y. 1984); *cf. Societe Internationale* v. *Rogers*, 357 U.S. 197, 204-13 (1958). Two recent Eleventh Circuit cases, however, indicate that court's willingness to approve civil contempt orders and accompanying sanctions that seek to compel a person to violate foreign secrecy laws by producing documents that are located on foreign soil. *See In re Grand Jury Proceedings (the Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 . . . (1985); *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 . . . (1983); *cf. United States* v. *Vetco Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 . . . (1981)."

In re Sealed Case, 825 F.2d at 497-98. The Seventh Circuit likewise has observed that "the Eleventh Circuit has reached a different result in a case involving [the production of foreign bank records from] a bank which was apparently a neutral source of information, as here." *United States* v. *First National Bank of Chicago*, 699 F.2d 341, 346-47 (7th Cir. 1983).

In the Eleventh Circuit, the controlling principle is this: "the vital role of a grand jury's investigative function to our system of justice . . . outweigh[s] the [foreign nation's] interest in protecting the right of privacy incorporated in its bank secrecy laws. . . . [W]e are not willing to emasculate the grand jury process." *Bank of Nova Scotia I*, 691 F.2d at 1391; *see also United States* v. *Field*, 532 F.2d 404, 407-09 (5th Cir. 1976). Thus, in holding UBS in contempt here, the district court held that Eleventh Circuit law "is as straight as an arrow on this subject. . . . [T]he one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under *Nova Scotia* to relieve you from compliance with the court order." (A6-A7.)

The D.C. Circuit rejected the Eleventh Circuit's rule in *In re Sealed Case*. The D.C. Circuit "recognize[d] that the grand jury's investigation may . . . be hampered, perhaps significantly," but concluded that "we are unable to uphold the contempt order against the bank." 825 F.2d at 499; *see also Ings* v. *Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960).

If the foregoing leaves any doubt that a split exists, it is put to rest by the Government. In its brief below, the Government cited *In re Sealed Case* as *contra* authority to *Bank of Nova Scotia*. Brief for the Appellee, *In re Grand Jury Proceedings*, No. 91-5522 (11th Cir. 1991) ("Brief for the Appellee") at 14.

2. The split between the circuits cannot be reconciled on the Government's theory that the D.C. and Eleventh Circuits both employ a flexible "balancing" test to analyze the question presented, but simply come out differently having applied that test. Brief for the United States in Opposition ("Gov't Opp.") at 7-8, 11-12.

The Government's theory is contradicted by its own arguments made in the course of the proceedings below. At the very outset, the Government warned petitioner's counsel that *any* motion by UBS to obtain judicial review of the subpoena served upon it would be nothing short of "frivolous[] . . . in the face of *Bank of Nova Scotia*."[2] Then, in the Eleventh Circuit, the Government stated that arguments as to "international comity . . . . have already been considered and rejected . . . in the *Nova Scotia* cases, and need not be reexamined here." Brief for the Appellee at 20-21, 15-16. According to the Government:

> "It does not serve the interest of justice to require district courts in every case in which foreign bank records are subpoenaed to conduct

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[2] Letter of Assistant U.S. Attorney Mark D. Seltzer to John Dickey, dated February 25, 1991, annexed as Exhibit B to the affidavit of Dr. Urs Philipp Roth, sworn to March 7, 1991.

> plenary, time consuming examinations of those factors in cases indistinguishable in operative facts from the *Bank of Nova Scotia* cases."

Id. at 7-8.

Of course, the facts in this case *are* vividly distinguishable from those in the *Bank of Nova Scotia* cases in almost every respect relevant to a reasoned comity analysis. *See* UBS's Petition for a Writ of Certiorari at p. 11 n.8. The only "indistinguishable" facts are that the cases involve foreign banks holding documents abroad that a U.S. grand jury has subpoenaed. What the Government meant was that where foreign bank records are subpoenaed by a U.S. grand jury, they *must* be disclosed regardless of any other fact. In the Government's words, the "defense" of foreign illegality simply is not "a valid objection for complying with a grand jury subpoena." Brief for the Appellee at 15.

The courts below followed the "straight as an arrow" course urged by the Government. Citing *Bank of Nova Scotia I* as "dispositive," the district court made *no* findings as to any facts relevant to a comity analysis and denied UBS's motion for an evidentiary hearing. (A8-A9.) At the contempt hearing, the district court ruled that proof of prohibitory foreign law could not excuse compliance with a subpoena *no matter what the facts and circumstances*. (A6.) The Eleventh Circuit then summarily affirmed[3] on the ground that the district court's denial of UBS's motion to quash and its imposition of contempt sanctions were

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[3] This Court regularly issues writs of certiorari in cases in which an appellate court has summarily affirmed, without opinion, a decision of a trial court. *See, e.g., Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610 (1986). Moreover, since the Eleventh Circuit accepted the district court's statement of the "dispositive" principle of *Bank of Nova Scotia* — foreign law is not a defense to a grand jury subpoena — a further opinion was unnecessary.

"without an error of law" and "an opinion would have no precedential value." 11th Cir. Rule 36-1.[4]

In summary, no "balancing" at all was done by the courts below. The balancing had been done, once and for all, in the *Bank of Nova Scotia* cases. None of the factors relevant to the comity analyses commonly conducted in other circuits was considered and no findings were made as to any such factors. That is because, in the Eleventh Circuit, *no* facts need be found if a U.S. grand jury subpoenas documents from abroad. As a matter of law the documents must be produced or sanctions will be imposed upon the neutral custodian of documents, whatever the true needs of the grand jury, whatever the prohibitions of foreign law, whatever the consequences of the violation of foreign law to the custodian, and whatever the alternative means available to the Government — customer consent, formal or informal legal assistance or otherwise — to obtain the information.

In other words, in the Eleventh Circuit the grand jury subpoena outweighs all competing factors. In the Eleventh Circuit the "balancing test" accepted and applied in other circuits has been reduced to an absolute rule of law.

3. The petition in this case squarely raises the important issues of international comity created by conflicts between foreign privacy laws and U.S. discovery procedures. All of the traditional elements of comity analysis are present: an innocent, disinterested holder of documents, a governing foreign law prohibiting disclosure, a grand jury subpoena requiring disclosure, sanctions under the foreign law for unauthorized disclosure, contempt sanctions under U.S. law for nondis-

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[4] As to circuit conflict, it should be noted that in *First National Bank of Chicago*, the Seventh Circuit reversed an order granting enforcement of an IRS subpoena, holding that it was "an abuse of discretion to enter an unqualified order compelling production, particularly where there is no indication of the rationale of the decision." 699 F.2d at 345.

closure, and alternative means of obtaining information sought by the grand jury.

The Eleventh Circuit disagrees fundamentally with the D.C. Circuit and other circuits even as to *whether* such factors are to be addressed in determining if disclosure will be ordered.[5] The Eleventh Circuit rule is absolute. Foreign prohibitory law is no defense to a U.S. subpoena. In practical effect the judicial inquiry is over once an Assistant U.S. Attorney causes a grand jury subpoena to be issued. No further facts need be considered. No further inquiry need be made. The consequences to the non-party document custodian are irrelevant. The availability of alternative procedures to obtain disclosure is of no concern.

In the D.C. Circuit, it is relevant that "[t]he government may find alternative means" to collect information from the foreign bank. *In re Sealed Case*, 825 F.2d at 499. In the Eleventh Circuit, however, "[t]he government does not have to pursue alternative procedures to obtain these documents." (A6.) Thus, the courts below never addressed UBS's claim that the Government could obtain bank records of UBS (Panama) by alternative means without requiring UBS (Panama) to commit a crime and expose its officials to jail terms.[6]

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[5] Even among the circuits that do accept comity analysis, there is disagreement as to how the various interests implicated by subpoenas seeking documents from foreign nations in violation of foreign law should be analyzed and as to the appropriateness of contempt sanctions when innocent third parties are caught between the conflicting demands of competing sovereigns. *See In re Sealed Case*, 825 F.2d at 497-98.

[6] The Government seeks to intrude a factual issue into this proceeding as to the efficacy of those alternative nonconfrontational means of obtaining the information it desires. (Gov't Opp. at 13-14.) But that is not the issue before this Court. The issue here is the *legal* question *whether* the availability of alternative means is even a factor to be considered in determining whether to enforce a U.S. grand jury subpoena in the face of conflicting foreign law.

The Seventh Circuit has held that the "extent and nature of [the] hardship" imposed on the bank "bears great weight." 699 F.2d at 345. The Eleventh Circuit, on the other hand, has repeatedly declared that by choosing to do business in more than one nation, third parties assume "the incidental risk of occasional inconsistent governmental actions." 740 F.2d at 828; *see also* 691 F.2d at 1391. As the district court put it, "You have to choose between the United States, to be obedient to our laws or be obedient to Panamanian laws." (A6.) The district court thus did not make any findings as to the threat of criminal prosecution if UBS (Panama) discloses the subpoenaed records. The Government submitted no evidence as to the prohibitions of Panamanian law, and its untested suppositions, repeated before this Court, must be disregarded. Indeed, the only evidence in the record (the unchallenged affidavit of a leading expert on Panamanian banking law, Dr. Gabriel Castro Suarez) establishes that UBS (Panama) and its directors and officers face criminal prosecution — and possible jail terms for the individuals — if the records are disclosed.

The D.C. Circuit considers it "[m]ost important" that contempt "sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign *on that sovereign's own territory.*" 825 F.2d at 498 (emphasis added). The Seventh Circuit has also found it significant that "the critical act of initially conveying the information would take place [in a foreign state.]" *First National Bank of Chicago*, 699 F.2d at 345. In the Eleventh Circuit, however, courts do not accord any weight to "the situs of the records." 740 F.2d at 828 n.17. Furthermore, the courts below placed no emphasis upon the fact that they lacked jurisdiction over UBS (Panama), the Panamanian national ordered to violate Panamanian law in Panama. In *United States* v. *First National City Bank*, 379 U.S. 378 (1965), it was noted that "[u]se of judicial equity powers to coerce a party over whom the court has no jurisdiction or likelihood of obtaining jurisdiction is unheard of." *Id.* at 389 (Harlan, J., dissenting).

As to the above elements it is appropriate and timely for this Court now to consider whether and to what extent they are to be examined in weighing the demands of U.S. agencies for extraterritorial discovery against the policies and laws of foreign sovereigns.

4. The government attempts to distinguish *In re Sealed Case* and *First National Bank of Chicago* from this case by challenging UBS's "good faith." (Gov't Opp. at 9-10.)[7] However, this argument is beside the point because the district court did not deem UBS's good faith to be of any relevance whatsoever and made no finding on the point:

> "The fact that you have made every effort is not enough according to case decisions. . . . It doesn't just mean in good faith. It means every single effort that you can make to comply and the one impediment to compliance is that you will have to violate Panamanian law. And that is not sufficient under Nova Scotia to relieve you from compliance with the court order." (A6-A7.)

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[7] The sole basis advanced for the Government's claim that UBS has not acted in "good faith" is that UBS (Panama) did not approach the law enforcement authorities in Panama to seek permission to commit a crime in Panama. However, the D.C. Circuit did not require the foreign bank involved there to seek permission to commit a crime. To the contrary, the D.C. Circuit observed that "[t]he executive branch may be able to devise alternative means of addressing this problem, but the bank cannot." 825 F.2d at 498. *See also In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (demonstrating "good faith" requires only that the bank "cooperat[e] with the Government when and if the Government seeks to obtain the records by application to the Panamanian authorities"). As to UBS's "good faith," the record demonstrates that UBS has acted throughout expeditiously and straightforwardly, attempting at every step to work with the Government to obtain customer or official Panamanian consent to the release of the documents. *See* Brief of Appellant Union Bank of Switzerland, *In re Grand Jury Proceedings*, No. 91-5522 (11th Cir. 1991) at 8-10, 13-14.

The Government's final effort to distinguish *In re Sealed Case* is based on the ground that the foreign bank there was owned by a foreign government. (Gov't Opp. at 9.) However, a bank owned by a foreign government is likely in a better position than a private bank to avoid criminal penalties for violating the law of the foreign state that owns it.

CONCLUSION

The circuits disagree over whether or when a U.S. court, by threat of sanctions, may compel an innocent third party to violate foreign law in order to comply with a subpoena of a U.S. grand jury or other agency. The Court should grant certiorari to address "the difficulties and uncertainties that now pervade this area of law." *In re Sealed Case*, 825 F.2d at 499.

Respectfully submitted,

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